

Michael A. Alib, Clerk

CIVIL ACTION NO. H-01-3624

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Pending before this Court are numerous related federal securities class actions that have been consolidated with the above-captioned action. Most if not all of these actions have been brought on behalf of purchasers of Enron common stock and they allege that the defendants violated Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC").

Pulsifer purchased Notes and seeks to represent a class of purchasers of the Notes, who have claims pursuant to the Securities Act of 1933 ("Securities Act") as well as claims under the Exchange Act. The Notes were sold to the public in an initial public offering pursuant to a Registration Statement on or about August 17, 1999 and they trade on the New York Stock Exchange. Pulsifer and other purchasers of the Notes have statutory claims pursuant to sections 11 and 12(2) of the Securities Act against persons who signed the Registration Statement for the Notes; Arthur Andersen LLP, Enron's auditor that audited financial statements included in the Registration Statement; and the underwriters for the offering of the Notes (Goldman, Sachs & Co., Banc of America Securities LLC and Salomon Smith Barney, Inc.).¹

The Private Securities Litigation Reform Act ("PSLRA") requires that courts appoint as lead plaintiffs those members of the putative class that have satisfied certain procedural prerequisites and also constitute the "most adequate representative" of the prospective class. Pulsifer satisfies all of the criteria for selection as lead plaintiff to represent purchasers of the Notes. Pulsifer's claims are typical of other purchasers of the Notes and it will fairly and adequately represent their interests in this action. Accordingly, Pulsifer should be appointed Lead Plaintiff on behalf of Notes purchasers.

¹ Because all of the Notes in the marketplace can be traced to the initial public offering of the Notes, all purchasers of the Notes have claims under Section 11 of the Securities Act.

Pulsifer also respectfully requests that the Court approve its choice of the law firms Shapiro Haber & Urmy LLP and Wolf Popper to serve as lead counsel and Beirne, Maynard & Parsons, L.L.P. as liaison counsel, in accordance with the PSLRA. The selected law firms have extensive experience and are well-qualified to represent the interests of all Class members.

SUMMARY OF THE CASE

Pulsifer in its complaint has alleged claims pursuant to Sections 11, 12(2) and 15 of the Securities Act and Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder, in that the Registration Statement and Prospectus for the initial public offering of the notes contain materially false and misleading statements. Specifically, Pulsifer's complaint alleges that Enron's financial statements incorporated by reference in the Prospectus were false and misleading, as Enron has subsequently admitted. Enron has withdrawn its audited financial statements for the years 1997 to 2000 and is restating them. Enron's net income has been reduced by \$96 million, or over 90%, for 1997 and by \$113 million, or 16%, for 1998.² Pulsifer Complaint ¶ 28. Under Section 11 of the Securities Act, persons who signed the Registration Statement, the underwriters, and Enron's auditors Arthur Andersen LLP ("Andersen") who issued audit reports on the 1997 and 1998 financial statements, are strictly liable for any material false or misleading statement or omission in the Registration Statement or Prospectus, subject only to a possible affirmative defense of "due diligence". Thus, Pulsifer's complaint names as defendants four senior officers of Enron who signed the Registration Statement, Andersen, and the underwriters. Pulsifer believes that its complaint is the only Enron related complaint filed to date that names these underwriter defendants.

² Enron's audited financial statements for 1997 and 1998 were incorporated in the Prospectus.

ARGUMENT

I. PULSIFER SHOULD BE APPOINTED LEAD PLAINTIFF

A. Pulsifer Has Satisfied The Procedural Requirements of The PSLRA

Under the provisions of the PSLRA, a person seeking to serve as lead plaintiff must fulfill certain procedural prerequisites prior to being appointed to serve in such a capacity. The first plaintiff who commences a securities fraud class action must publish a notice to the class, within twenty days of filing the action, informing class members of the pendency of the action and their right to file a motion for appointment as lead plaintiff. *See* PSLRA § 21D(a)(3)(A)(i), 15 U.S.C. § 78u-4(a)(3)(A)(i). Next, within sixty days after the publication of notice, any person or group of persons who are members of the proposed class may apply to the court to be appointed as lead plaintiffs, whether or not they have previously filed a complaint in the action. *Id.*

All the procedural requirements set forth in the PSLRA have been fulfilled. On October 22, 2001, plaintiff Mark Newby filed a complaint with this Court. On that same day, Newby's counsel caused the initial notice of the pendency of the action to be published and disseminated on *PR Newswire*, a widely circulated, national, business-oriented wire service. A copy of this notice is attached as Exhibit 1 to the Declaration of Thomas G. Shapiro (the "Shapiro Declaration"), submitted herewith. As required by the PSLRA, the notice advised members of the proposed Class of their right to move the Court to serve as lead plaintiffs no later than sixty days after the publication of notice. *Id.* The present motion has been made within sixty days of the issuance of that notice. Thus, Pulsifer has satisfied the procedural prerequisites set forth in the Act.³

³ It should be pointed out that the Newby notice stated that the case was brought on behalf of purchasers of the common stock of Enron, which would not include debt securities such as the Notes. Another notice also issued on October 22 by the law firm of Milberg Weiss similarly gave notice that suit had been brought on behalf of the purchasers of Enron common stock. However, a notice was issued on October 24 by the law firm of Berger & Montague, giving notice of the filing of a suit on behalf of all persons or entities who purchased Enron "securities".

B. Pulsifer Constitutes The "Most Adequate Plaintiff"

The PSLRA mandates that, not more than ninety days after publication of the initial notice a court shall consider any motion made by any class member, and appoint as lead plaintiff, the member(s) of the class that the court determines to be most capable of adequately representing the interests of class members. PSLRA § 21D(a)(3)(B), 15 U.S.C. § 78u-4(a)(3)(B). Under the PSLRA, such persons are referred to as the "most adequate plaintiff." *Id.*

The statute dictates that courts must presume that the most adequate plaintiff:

is the person or group of persons that:

(aa) has either filed the complaint or made a motion in response to a notice . . . ;

(bb) in the determination of the Court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil

Procedure.

PSLRA § 21D(a)(3)(B)(iii)(I), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

Pulsifer, who is entitled to this presumption, is demonstrably the most adequate plaintiff.

A copy of the Berger & Montague notice is attached as Exhibit 2 to the Shapiro Declaration. In addition, it should be pointed out that the notices issued on October 22 and October 24 specified a shorter class period than the Pulsifer class period (August 17, 1999 to the present) and the class periods alleged in numerous other subsequently filed cases on behalf of common stock purchasers. Changes in the class period, however, do not require new notices and an extension of the 60 day period for moving to be lead plaintiff. *Lax v. First Merchants Acceptance Corp.*, U.S. Dist. LEXIS 11866 at *10-14 (N.D. Ill. Aug. 6, 1997).

1. Pulsifer Has Moved To Be Appointed As Lead Plaintiff.

Pulsifer has fulfilled the first prong of the foregoing statutory test for determining the most adequate plaintiffs. Pulsifer has attested to its willingness to serve as representative on behalf of a class of purchasers of the Notes and has made this motion.⁴ Therefore, this element is satisfied.

2. Pulsifer Has the Largest Financial Interest in the 7% Exchangeable Notes.

The second prong of the test for the "most adequate plaintiff" requires the proposed lead plaintiff to have the largest financial interest in the relief sought by the action. Under the PSLRA, "institutional investors and other class members with large amounts at stake" are presumptively the most adequate plaintiffs. *Gluck v. Cellstar Corp.*, 976 F. Supp. 542, 548 (N.D. Tex. 1997). Pulsifer purchased \$1,453,635 worth of 7% Exchangeable Notes during the Class Period and suffered damages of approximately \$1 million. See Pulsifer certification, Shapiro Declaration, Exhibit 3. Pulsifer is unaware of any other person or group of persons moving for lead plaintiff status with respect to the Notes. In addition, Pulsifer is an institutional investor, in that he is a professional money manager investing funds on behalf of clients. Thus, Pulsifer is presumptively the most adequate plaintiff. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

3. Pulsifer Satisfies Rule 23.

PSLRA § 21D(a)(3)(B)(iii)(I)(cc) dictates that the proposed lead plaintiffs must also "otherwise satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure." To satisfy Rule 23, plaintiffs seeking class certification must demonstrate that: the number of class members is so large that joinder of all class members is impracticable; common issues of law and fact exist and predominate over individual questions; the class representatives are typical of class

⁴ Pulsifer has executed a Certification attesting to, *inter alia*, its willingness to serve as lead plaintiff in this action, and listing its transactions in Enron securities. Pulsifer's Certification, which was filed with his complaint, is also attached as Exhibit 3 to the Shapiro Declaration.

members; the class representatives will fairly and adequately protect the interests of the class; and a class action is superior to individual actions. *See* Fed. R. Civ. P. 23(a) and (b)(3).

Courts have consistently held that in a motion for appointment of lead plaintiffs, plaintiffs need only make a preliminary showing of typicality and adequacy under Rule 23(a). *See Tarica v. McDermott International, Inc.*, 2000 WL 377817, at *4, Fed. Sec. L. rep. ¶90,946 (E.D. La. Apr. 13, 2000); *In re Oxford Health Plans, Inc., Sec. Lit.*, 182 F.R.D. 42, 49 (S.D.N.Y.1998); *Greebel v. FTP Software, Inc.*, 939 F.Supp. 57, 64 (D.Mass.1996).

a. Pulsifer Fulfills The Typicality Requirement.

Under Rule 23(a), typicality is satisfied when "the claims or defenses of the representative parties are typical of the claims or defenses of the class," and adequacy is met when "the representative parties will fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(3), (4). The Fifth Circuit has held that "the test for typicality is not demanding. It focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir.1999).

Pulsifer satisfies the typicality requirement under Rule 23(a)(3) in that he is a purchaser of the Notes. As alleged in its complaint, Pulsifer purchased the notes without knowledge that Enron's financial statements incorporated in the Prospectus were false. Pulsifer Complaint ¶s 47, 55 and 90.'

b. Pulsifer Fulfills the Adequacy Requirement.

Pulsiver is a professional money manager who has the experience and expertise to do an excellent job representing purchasers of the Notes. He has retained counsel with the experience and ability to represent the Class forcefully and effectively. (See Section II below) Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the

class." In order to satisfy adequacy of representation, counsel must be qualified, experienced, and able to prosecute the action vigorously, and the class representatives must not have interests antagonistic to the class members. *See, e.g., Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir.1986); *Tarica, supra* at *5; *In re Lease Oil Antitrust Lit. (No. II)*, 186 F.R.D. 403, 421 (S.D.Tex.1999).

Pulsifer satisfies the adequacy requirement under Rule 23(a)(4).

II. THE COURT SHOULD APPROVE PULSIFER'S CHOICE OF COUNSEL

The PSLRA vests authority in the lead plaintiff to select and retain counsel, subject to court approval. *See* Section 21D(a)(3)(B)(v), 15 U.S.C. § 78u-4(a)(3)(B)(v). Consistent with Congressional intent, a court should not disturb the lead plaintiff's choice of counsel, unless "necessary to protect the interest of the plaintiff class." *See* Statement of Managers -- The "Private Securities Litigation Reform Act of 1995," 141 Cong. Rec. H13691-08, at H13700, H. R. Conf. Rpt. No. 104-369, at 62, 104th Cong. 1st Sess. (Nov. 28, 1995). Pulsifer has selected Shapiro Haber & Urmy LLP and Wolf Popper as lead counsel and Beirne, Maynard & Parsons, L.L.P. as liaison counsel to represent itself and the proposed class. The Shapiro and Wolf Popper firms have extensive experience and they have been highly successful in prosecuting securities fraud class action litigation, as detailed in their resume annexed as Exhibit 4 and 5 to the Shapiro Declaration. The Beirne firm is well known in the Houston legal community and it has had extensive experience and success in litigating complex matters. The Beirne firm's resume is attached as Exhibit 6 to the Shapiro Declaration. As a result of their extensive experience in litigation involving issues similar to those raised in this action, these counsel have skills and knowledge which will enable them to prosecute this action effectively and expeditiously. Thus,

the Court may be assured that by granting this motion, the members of the Class will receive adequate legal representation.

CONCLUSION

For all of the above reasons, Pulsifer respectfully requests that this Court enter an order (i) appointing Pulsifer as Lead Plaintiff to represent purchasers of Enron 7% Exchangeable Notes due July 31, 2002 and (ii) approving Plaintiff's selection of the law firms Shapiro Haber & Urmey LLP and Wolf Popper LLP as lead counsel and Beirne, Maynard & Parsons, L.L.P. as liaison counsel.

Dated: December 21, 2001

Respectfully submitted,

By its attorneys,



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United States Courts
Southern District of Texas
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Michael A. Wilby, Clerk

CIVIL ACTION NO. H-01-3624

I, Thomas G. Shapiro, under the penalty of perjury, depose and say:

2. On October 22, 2001, my firm, as counsel for Mark Newby, the plaintiff in the above-captioned action, caused notice (the "Notice") to be published pursuant to Section 21D(a)(3)(A)(i) of the Securities Exchange Act of 1934 (the "Exchange Act") over a national business-oriented wire service, PR Newswire, advising purchasers of Enron Corporation ("Enron" or the "Company") common stock of their right to move the Court to serve as lead plaintiff in the above action within sixty (60) days after publication of the Notice. Attached hereto as Exhibit 1 is a true and accurate copy of such notice.

3. On October 24, 2001, the plaintiff in a related action caused a notice to be published over a national business-oriented wire service, PR Newswire, advising purchasers of

all Enron securities of their right to move the Court to serve as lead plaintiff in the above actions by December 21, 2001. Attached hereto as Exhibit 2 is a true and accurate copy of such notice.

4. On December 14, 2001, Pulsifer & Associates ("Pulsifer") brought a class action suit on behalf of purchasers of Enron Corporation ("Enron" or the "Company") 7% Exchangeable Notes due July 31, 2002 (the "Notes"). (See C.A. No. H-01-4356). Pulsifer filed with its complaint a certification in accordance with Section 21D(a)(3)(B)(aa) of the Exchange Act, attesting to its willingness to serve as lead plaintiff and setting forth its purchases and sales of the Notes. Attached hereto as Exhibit 3 is a true and accurate copy of Pulsifer's certification.

5. As set forth in its certification, Pulsifer suffered losses of at least \$1 million.

6. The firm resume of Shapiro Haber & Urmy LLP is attached hereto as Exhibit 4.


7. The firm resume of Wolf Popper is attached hereto as Exhibit 5.

8. The firm resume of Beirne, Maynard & Parsons, L.L.P. is attached hereto as Exhibit 6.

9. The certification of Class Member Murray Van de Velde is attached hereto as Exhibit 7.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 20, 2001



Thomas G. Shapiro

The Exhibit(s) May
Be Viewed in the
Office of the Clerk